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S. D. THOMPSON, Ass't Editor. }

A GOOD SUGGESTION.—The communication from "C.," in another column, embodies some excellent suggestions in regard to a mode by which lawyers may keep their libraries intact, and at the same time oblige each other by lending books when required. Those who have had valuable liabraries depleted by the inevitable book-borrower (and who has not?) will read C.'s suggestions with interest, and, we doubt not, with profit.

A PARTING WORD.—We shall probably not have an opportunity of addressing our readers again through these columns during the present year, and as some of them will not be with us during the coming year, we tender to such a parting shake of the hand, and to all our best wishes for a merry Christmas and a happy New Year. In looking back, we see that we promised several things when we began, which we have not fulfilled. We also confess that we have been somewhat hasty at times in expressing opinions, although we trust we have been honest and not dull. We hope to do better next year, and shall endeavor to weed out some of our errors and not let them go to seed. We also hope, with the experience of the past year, to make the JOURNAL, during the coming year, more *useful*, and hence more deserving of the patronage of the profession.

OUR NEXT NUMBER.—We notified our readers some time since that we should close the present year with number 53. The unexpected length of the index, the fact that we publish with it a complete table of all cases reported, digested or cited, and the further fact that were we to issue a fifty-third number, it would fall on the first day of the new year, the day of publication of our first number of the second volume, induces us to print it as number 52 instead of number 53. Should any of our readers feel disposed to complain at this, we would remind them that we have published during the year several numbers of extra size, thus giving them thirteen pages more reading matter than they would get in 52 numbers of our regular size. Our next number, therefore will consist of an index and table of cases, and as it will not be very entertaining reading, our readers will not be disappointed if it does not appear on the precise day.

Foreign Larcenies.

The Monthly Western Jurist, for December (Bloomington, Ill.), contains an article under the caption "Larcenies in Foreign Countries not Punishable in the United States." This article is chiefly valuable from the fact that it sets out at full length the opinion of the Supreme Court of Ohio, in Stanley v. The State MS., a case which was decided at the November, 1873, term of that court. This case contains a very full and able discussion of the question, and collates a large number of authorities, the result of which seems to be:

1. That where goods are stolen upon the high seas and carried into England, the thief cannot be convicted in the courts of the common law in England. 13 Coke, 53; 3 Inst. 113; 1 Hawk. P. C. ch. 19, § 52.

2. That where goods are stolen in another sovereignty and carried into England, the thief cannot be convicted in England. Regina v. Madge, 9 Car. & P. 29.

3. That formerly where goods were stolen without the body of a county of England, but within the United Kingdom or the Provinces, and carried into England, the thief could not be convicted in England. As where goods were stolen in the island of Jersey: Rex. v. Prowes, 1 Moody C. C. 349. Or in Scotland: 2 East P. C. 772, ch. 16, § 156. But this has been changed by statute, so that the thief may be prosecuted in any county where found with goods in his possession, stolen by him in any part of the United Kingdom. 13 Geo. 3, ch. 31, § §4 and 7; 8 Geo. 4 ch. 29, § 76.

4. That the following cases hold that where goods are stolen in one of the United States, and carried by the thief into another, the courts of the latter state have jurisdiction to convict him of larceny: Hamilton v. The State, 11 Ohio, 435; The State v. Ellis, 3 Conn. 185; The State v. Bartlett, 11 Vt. 650; The State v. Underwood, 49 Maine, 181; Watson v. The State, 36 Miss. 593; The State v. Johnson, 2 Oregon, 115; The State v. Bennett, 14 Iowa, 479; Ferrell v. Commonwealth, 1 Duvall, 153; Commonwealth v. Collins, 1 Mass. 116; and several subsequent cases in Massachusetts.

5. That the following cases hold the contrary: People v. Gardner, 2 Johns. 477; People v. Schenk, 2 Johns. 479; The State v. Le Blanch, 2 Vroom, 82; Simmons v. Commonwealth, 5 Binn. 617; The State v. Brown, 1 Hayw. 100; Simpson v. The State, 4 Humph. 456; Beall v. The State, 15 Ind. 378; The State v. Reonnals, 14 La. An. 278. But this rule was afterwards changed in New York by statute.

6. That there are two cases which hold that where goods are stolen in a foreign country and brought into one of the United States, the courts of such state have jurisdiction to convict the thief of the larceny: The State v. Bartlett, 11 Vt. 650; The State v. Underwood, 49 Maine, 181.

7. That there are two cases in which this is denied: Comm. v. Uprichard, 3 Gray, 434, and Stanley v. The State, *supra*.

After collating at length the authorities, the court in Stanley's case reason the question as follows:

> The judgment below is wrong, unless every act of the defendant, which was necessary to complete the offence, was committed within the state of Ohio and in violation of the laws thereof. This proposition is not disputed. It is conceded by the prosecution that the taking, as well as the removal of the goods *animo furandi*, must have occurred within the limits of Ohio. It is also conceded that the first taking, as well as the first removal of the goods alleged in this case to have been stolen, was at a place beyond the limits of the state, and within the jurisdiction of a foreign and independent sovereignty. Now, the doctrine of all the cases is that the original "taking" and the original asportation of the goods by the prisoner, must have been under such circumstances as constituted a larceny. If the possession of the goods by the defendant, before they were brought into this state, was a lawful possession, there would be no pretense that the conviction was proper. The same, if his possession was merely tortious. The theory of the law, upon which the propriety of the conviction is claimed, is based on the assumption that the property was *stolen* in Canada by the prisoner.
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> By what rule shall it be determined whether the acts of the prisoner, whereby he acquired the possession of the goods in Canada, constituted the crime of larceny? By the laws of this state? Certainly not. The criminal laws of this state have no extra-territorial operation. If the acts of the prisoner, whereby he came in possession of the property described in the indictment were not inhibited by the laws of Canada, it is perfectly clear that he was not

guilty of larceny there. It matters not that they were such as would have constituted larceny if the transaction had taken place in this state.

Shall the question whether or not the "taking" of the property by the prisoner was a crime in Canada, be determined by the laws of that country? If this be granted, then an act, which was an essential element in the combination of facts of which Stanley was found guilty, was in violation of the laws of Canada but not of this state; and it was because the laws of Canada were violated that the prisoner was convicted. If the laws of that country had been different, though the conduct of the prisoner had been the same, he could not have been convicted. I can see no way to escape this conclusion, and if it be correct, it follows that the acts of the prisoner in a foreign country, as well as his acts in this state, were essential elements in his offence; therefore, no complete offence was committed in this state against the laws thereof.

I have no doubt the legislature might make it a crime for a thief to bring into this state property stolen by him in a foreign country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offence. But that offence would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and carrying away the goods of another person in violation of the rules of the *common law*, without reference to any other law or the laws of any other country.

It may be assumed that the laws of *meum et tuum* prevail in every country, whether civilized or savage. But this state has no concern in them further than to discharge such duties as are imposed upon it by the laws of nations, or through its connection with the general government, by treaty stipulations.

Our civil courts are open for the reclamation of property which may have been brought within our jurisdiction, in violation of the rights of the owner; but our criminal courts have no jurisdiction over offences committed against the sovereignty of foreign and independent states.

We are unable to perceive any substantial ground of distinction, with respect of this question, between larcenies committed in other states and those committed in a foreign country. With reference to the punishment of crimes against their own jurisdiction, the different states of the American Union seem as distinctively sovereign and independent, with reference to each other, as the state of Ohio is sovereign and independent with reference to the Dominion of Canada.

Power of the Judiciary to Control the Official Acts of Officers of the Executive Department of the Government.

We published some time since (*ante*, p. 401) a very important opinion of the Supreme Court of Texas, in the case of Bledsoe v. The International Railroad Company, involving the question whether the judiciary of that state has power to control by *mandamus* an official act of the comptroller, and resolving the question in the negative. The reasons on which that decision was based are still no doubt fresh in the minds of some of our readers. They were briefly these: that the office of comptroller is created by the constitution of the state; that by that instrument he is named one of the executive magistracy of the state, as fully as is the governor himself; and hence, that any attempt on the part of the judiciary to compel him to deviate from the course he chooses to take in the performance of an official act (although that act be, as many cases express it, a *ministerial* one merely, and one not involving an exercise of discretion) involves an invasion on the part of the judiciary of the jurisdiction and powers of a distinct, separate and co-ordinate department of the government.

Our readers will remember that this opinion was by a divided court, the opinion of the court having been delivered by a special judge, sitting (we believe) in the place of Mr. Justice Moore, who was incompetent by reason of having been of counsel in the case. It would be imagined that such a decision, however able the reasoning of the opinion delivered by the majority, would not put to rest a question of such importance. Accordingly we find that very soon after this decision had been pronounced, substantially the same question came before the court again in the case of Keuchler, Commissioner of the General Land Office of Texas, v. Wright. This was a suit by *mandamus*, instituted in 1871, by George W. Wright, to compel the Commissioner of the General Land Office of the State of Texas, to issue to him a patent to land which he had located and surveyed, by virtue of a land certificate for the unlocated balance issued to Henry Buckler, for 640 acres of land assigned in writing to said Wright by Eliza Higgins, widow of Henry Buckler, and her present husband, Wm. L. Higgins, and Isabella Buckler, claiming to be the widow and heir of Henry Buckler, to which written transfer of said certificate was attached the private acknowledgement of the said married woman, taken before a justice of the peace in the state of Arkansas. This land certificate was located and surveyed on lands known as the "State sections," within the Memphis, El Paso and Pacific Railroad reservation. The Commissioner appeared by the Attorney General, and demurred to the petition of Wright, and justified his refusal to issue the patent on the ground that the lands located and surveyed by Wright were, by the constitution and laws of the state in force, reserved from location by virtue of such certificate. The only evidence before the court was a certified copy of the papers on file in the General Land Office. The court below determined (the case being submitted to the court on the pleadings and on said certified copy of the papers in the Land Office) in favor of the plaintiffs, and awarded a peremptory *mandamus* against the commissioner, from which judgment an appeal was taken, and brought into the Supreme Court in 1872. This court, in 1872, delivered an opinion, and rendered a judgment reversing the judgment below and dismissing the suit. At the same term a rehearing was granted. In 1873 the Supreme Court delivered another opinion, sustaining the first, and confirming its own judgment already rendered in the case. At the same term, in 1873, another motion for rehearing was made by Wright, which was continued at another term, and the judgment suspended to await the determination of the motion for rehearing. The case, then, came before the present bench on a motion for a rehearing, and was again argued to enable the members of the court to decide upon the propriety of granting the motion. This a majority of the court united in refusing on the merits of the case, while asserting that the district court has jurisdiction to award a mandamus against the commissioner of the general land office, to compel him to perform a ministerial duty which is clearly enjoined by law.

When it is remembered that in Texas the office of commissioner of the general land office is created by the constitution, and that this officer is, equally with the governor and comptroller, a member of the executive magistracy of the state, the significance of this decision will be seen. It overrules Bledsoe v. The International Railroad Company, and establishes the principle that under the present constitution of Texas the district court has jurisdiction to award a *mandamus* against an officer of the executive department of the government, to compel the performance of official acts where the

law does not make the performance of them discretionary with the officer. The opinion of the majority of the court was delivered by Mr. Justice Moore, who, as above stated, did not sit in the Bledsoe case. His opinion will be found in the Chicago Legal News for November 21 and November 28. His opinion is long, embraces a very thorough citation of the adjudications bearing upon the question, and is very forcibly reasoned. Mr. Chief Justice Roberts dissented at great length, and in his opinion examines the question involved with an ability which, in our judgment, stamps him as one of the foremost jurists of the country. He examines a very great number of authorities with a searching discrimination, and expresses his views in forcible, and at times, in eloquent language. We have a copy of his opinion before us as published in the Houston Daily Telegraph for August 30.

Quite a number of decisions have been made by the American courts on the question here involved, some of them affirming, others denying the jurisdiction which the majority of the court in this case adjudge to exist. Some of these cases we have examined at length; others but hastily, and we doubt whether, since the original case of Marberry v. Madison, 1 Cranch, 137, the question has ever been more thoroughly considered than in this case.

The question involved is one of great difficulty, and powerful arguments may be brought to bear on both sides of it. In support of the jurisdiction it is urged that we live in a government of law, and that if any officer of the goverment, be he the governor himself, captiously refuses to perform a plain duty involving the rights of a citizen, such citizen ought not to be compelled to suffer the wrong, but ought to have redress in the judicial tribunals according to the law of the land. This argument is clearly stated, and an array of cases cited in support of it, in the opinion of Mr. Justice Moore, who uses the following language:

While it must be admitted no human government can be organized which will, in all instances, secure the citizen in the complete and perfect enjoyment of all his rights of person and property, and there must be an end of controversy somewhere, whether the result attained is what it should be or not, yet I cannot see that this is a reason why the citizen should be deprived of all remedy touching the matters of individual right depending upon the performance of a merely ministerial duty. The time-honored maxim, that there is a remedy for every wrong, if not true to the letter, is surely persuasive that an element of judicial power of so much importance, recognized from time immemorial by the courts of the country from which our jurisprudence is derived, and exercised under a similar constitutional provision to ours by the courts of every state in the union, is not denied to our courts. Northwestern N. C. R. Co. v. Jenkins, 65 N. C., 173; State v. Lawrence, 3 Kan. 95; State v. Secretary of State, 33 Mo. 293; People v. Smith, 43 Ill. 219; Hemmerick v. Hunter, 14 La. An. 221; State v. Wrotnowski, 17 La. An. 156; State v. Draper, 48 Mo. 213; Swan v. Buck, 40 Miss. 219; Swan v. Work, 24 Miss. 439; *ex parte* Pickett, 24 Ala. 91; *ex parte* Echols, 39 Ala. 698; State v. Bordelon, 6 La. An. 68; People v. Smith, 48 Ill. 219; People v. Secretary of State, 58 Ill. 90; Swan, Auditor, v. Josselyn, 14 S. & M. 106; Auditor v. Adams, 13 B. Monroe, 150; Douglas v. Hastings, 15 Wis. 75; Free Press Association v. Nichols, 45 Vt. 7; Bryan v. Collet, 15 Iowa, 538; Auditor v. Hardin, 8 B. Monr. 648. In the last two of these cases the same objections to the jurisdiction of the court, which has been relied upon here, where directly presented and lucidly discussed, and decided in favor of the jurisdictional right of the court to award the writ To enquire into and determine as to matters of this character, and to prevent the rights of citizens from being "sported away" at the whim or caprice of officers in the exercise of merely ministerial duty, is plainly, in my opinion, the exercise of the judicial power conferred by the constitution. The court of England and America have always claimed and used it as such. The legislative and executive departments have at all times heretofore recognized and acquiesced in its exercise by the judicial department, even when it was not regulated and defind by statute.

On the other hand it is urged that litigation must end somewhere, and that it is a sufficient answer to all objections that exclusive jurisdiction has been vested by the constitution in an officer of the executive department of the government to perform certain acts and to decide certain questions, and that no jurisdiction has been expressly granted to any other tribunal by that instrument to review his decisions, or control his discretion in the exercise of his official functions; and that the assumption of such a power by the judiciary would be an invasion by one co-ordinate department of the government of the powers delegated exclusively to another, which might lead to unseemly conflicts of jurisdiction and even to anarchy. It is urged with much force that courts are but men; that men are greedy of power, and that courts are greedy of jurisdiction; and that if the boundary is once passed which separates the province of the courts from that of the other co-ordinate departments of the government, there are no well-defined barriers to check their aggressions. "There must of necessity," said Mr. Chief Justice Roberts in his dissenting opinion, "be a finality—a finality in the determination of the rights of individuals, in whatever departments they may arise or pertain to, and some man, or set of men, must make the final determination. In a despotism, such one man is easily pointed out. In a republican state, such as ours, wherein all of the powers of government are divided into three distinct departments, there must be a final determination of each department for itself, of all such matters as are assigned to it in the division. Otherwise there is no division—no binding, effective and 'distinct' division of powers."

We incline in opinion with the chief justice. His reasoning strongly resembles that of Mr. Justice Cooley in the case of People v. Badgley (*ante*, 299), and seems to our mind conclusive. The case of an office created, and its duties defined by an act of the legislature, may rest on somewhat different grounds. But we perceive no substantial distinction with respect to this question, between the case of the governor of a state and that of any other officer of the executive department thereof whose office is created and whose powers are defined by the organic law. Unless the same organic law has granted to another jurisdiction power to control such officer, he is above control. "Were the courts to go so far," said Mr. Justice Cooley in the case of People v. Badgley, *supra*, "they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government."

Constitutional Law—Release of State's Lien upon Railroads.

SILAS WOODSON AND H. CLAY EWING v. URIEL A. MURDOCK AND LUTHER C. CLARK.

[Continued from our last.]

Mr. Justice MILLER dissenting.

I cannot agree to the judgment of the court, and think the principle involved of sufficient importance to justify an expression of my views.

For many years previous to the late civil war, the principal railroads in the state of Missouri had been the objects of the special care of the people, and had received large pecuniary aid from the state. This aid had been given at various times and in divers sums, in the shape of the bonds of the state, to the extent, in the aggregate, of twenty-five millions of dollars or more. For these sums, which were treated as loans, the railroad companies had consented to statutory liens in the nature of mortgages, with conditions to pay the bonds of the state, interest and principal, as they fell due. If the terms of the loan were not precisely as I have stated in all cases, they were substantially so, and any variations in special instances do not affect the qestion under consideration.

The state of Missouri was, almost as much as any state in the Union, the seat of the worst calamities of that war. Its people were divided among themselves; regualar armies marched and counter-marched over its soil, and each side used or abused the railroads to their utmost capacity when within their control. But, above all, the local guerilla warfare, to which the disputed control of her territory and the divided allegiance of her people subjected them, was the cause of immense destruction and damage of her railroads. These companies, therefore, emerged from the war with their roads in a state of repair which hardly admitted of use, and the rolling-stock so deteriorated that new supplies were indispensable. Their credit was low, their means exhausted, and their property apparently worth but little. They were unable to meet their obligations to the state, and were largely in arrears for the interest on the state bonds.

The state itself was in little better condition. To the heavy burdens of increased taxation, imposed by the federal government to support the war and to pay its debt, was now added the nenecessity of paying the interest on the large debt of the state incurred in aid of the railroad companies.

The question forced itself upon the people of the state and the railroad companies, what is to be done in this emergency? The people of the state felt the injustice, in their over-burdened condition, of being called on to pay, without aid from the corporations, the debt incurred for their benefit, and this hardship was not diminished by the consideration that the roads were owned and controlled by stockholders, very few of whom were citizens of Missouri. The railroad companies felt that if their roads were to be made capable of accomplishing the purpose of their creation, all their means and all their credit must be devoted to repairing and rebuilding the road and refurnishing the rolling-stock.

The railroad companies and that part of the people of the state who felt a stronger interest in the roads, appealed to the generosity of the legislature to relieve the roads from the burden of the debt to the state. Those who believed that the credit of the state and the relief of the people from the burden of excessive taxation were of paramount importance, thought the state should relieve herself, as far as possible, by enforcing her lien at the expense of the stockholders, and by sale of the roads, realize all they would bring, and, appropriating this to the payment of the bonds of the state, diminish to that extent the taxation necessary to pay the interest on her large public debt.

The appeal for leniency to the railroad companies had many and able advocates, and was warmly urged by them, and assisted by all the appliances which that class of corporations use with so much effect. The legislature had in several instances released liens altogether on some roads, and had postponed liens to let in subsequent ones, thus showing what might be expected of that body.

It was in the midst of the discussion of this question that the members of the constitutional convention of 1865 were elected, and in the face of the difficulties which it presented, that the convention assembled.

They took cognizance of the matter. They understood that they were expected to adopt some plan of relief, and whatever plan was adopted must be based mainly, if not exclusively, on one or the other of the two propositions we have named. We are not called upon to give judicial construction to what they did, and, by all the rules of sound interpretation, it must be done in view of the condition of affairs which their action was intended to relieve, and of the public sentiment which they intended to represent.

It was very clear, then, it is equally clear *now*, looking alone to what was incorporated into the constitution by that convention, that wholly rejected the idea of leniency to the railroad companies, and that its sole care was to conserve the pecuniary interest of the state.

As the constitution stood when the convention assembled, it was in the power of the legislature — of any legislature — at any time, under the pressure of any influence, to release the lien of the state on the roads, or to make any other compromise of the claim of the state. If the convention was fully determined against this policy, it was their first duty to take this power from the legislative body altogether. The first thing to be done was to forbid the legislature from granting this relief. In the effort to carry out this purpose the convention placed in the body of the constitution, article IV., section 15, the declaration that "the general assembly shall have no power *whatever* to release the lien held by the state upon any railroad."

It seems to me strange that this provision should be the subject of a divided opinion as to its meaning. The release here meant could not have been the execution of a technical instrument called a release. No such absurdity can be imputed to the convention, because if the debt was paid, or otherwise discharged, so that the lien no longer existed, the making of such an instrument was of no value to any one. The thing prohibited was the discharge or remission in any shape of the specific lien which the state had on the roads for the payment of the bonds she had advanced or loaned to the companies. To make this more emphatic, all power *whatever* on this subject was taken away. No pressing exigency, no motive however pure or generous, and no consideration even of pecuniary wisdom in which the legislature might indulge or believe was to justify this discharge of the lien which the state held as security for her advances. How can it be maintained in the face of this, that while the legislature could not release from motives of grace, and for the purpose of gratuity, it could release on a purpose of compromise, by accepting one-third or one-half of the debt secured by the lien? If one-third could be accepted, then one-tenth. If five millions could be accepted when ten were due, then five dollars could be accepted. It is to be borne in mind that we are considering the constitutional power of the legislature to release the lien, and on this question we are not at liberty to consider whether it acted wisely or reasonably. If they could release at all, or for any consideration, the court cannot say they have exceeded their power. But the constitution seems to place all this beyond question by saying it shall not have any power *whatever* to do this thing.

The work of the convention was, however, to be submitted to a vote of the people. If it received a majority of the votes cast, it became the fundamental law of the land. Otherwise it passed for nothing. Other propositions were submitted separately, and might be adopted or rejected without hazarding the whole instrument. But so important did the convention deem this provision that they put it into the body of the new constitution, so that the latter could not be adopted without including the former.

If, however, the question of releasing the road from its debt to the state was thus settled in the negative, there still remained the question of the present enforcement of the lien by sale or otherwise. This question was left by the convention to a vote of the people, in a separate ordinance, which might be adopted or rejected without defeating the constitution itself, but which, if adopted, became part of the constitution.

Both the constitution and this ordinance were submitted at the same time, and both were adopted and became part of the funda-

mental law of the land at the same time. This ordinance throws a flood of light on the intention of the men who framed the constitution in adopting the section we have just discussed. It imposed a tax of ten per cent. on the gross receipts of the three principal roads from October, 1864, to October, 1868, and fifteen per cent. thereafter; to be devoted to the payment of the principal and interest of the bonds loaned by the state; and it required that if either of said companies neglected or refused to pay said tax, the general assembly should provide by law for the sale of that road. The fifth section of this ordinance is as follows:

"Whenever the state shall become the purchaser of any railroad or other property, or the franchises sold as hereinbefore provided for, the general assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the railroad company in default; but no railroad or other property or franchises purchased by the state shall be restored to any such company until it shall have first paid, in money or in Missouri state bonds, or in bonds guaranteed by this state, all interest due from said company, and all interest thereafter accruing shall be paid semi-annually in advance; and no sale or other disposition of any such railroad or other property or their franchises shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money or in the bonds or other obligations of this state."

The manner in which this ordinance was put to the people is significant. The ballot was to be, "shall the railroads pay their bonds?" "Yes." "Shall the railroads pay their bonds?" "No." The former was a vote for adopting the ordinance; the latter was a vote against it. It is thus seen that if this ordinauce was adopted, both the convention and the people were in earnest in their determination not to release any claim the state had in those companies. The peculiar provision of the above section makes this very clear. If the state became the purchaser the legislature should provide for the manner of its resale; but in no event was it to be restored by resale or otherwise to the company who had owned it, until that company had first payed in money, or bonds of the state of Missouri, all the accrued interest due from said company; and all interest thereafter to accrue was to be paid in advance semi-annually. It was also provided that *no* sale or other disposition of such railroad should be made without reserving a lien upon all the property and franchises thus sold or disposed of *for all sums remaining unpaid.*

The sale or disposition here spoken of had reference to a sale to other parties than the defaulting company. And even in that case the ordinance provided that none should be made which did not secure the state for all her liabilities on account of the road. The clause can have no other meaning but this, though it is ably argued that it means such part of the consideration of the new sale as may be on credit. But, taking the constitutional provision, the prohibtion in the ordinance against a restoration of the roads without payment of what is due, and security for what is to become due, it seems to me hardly to admit of a doubt that *in no event* was the road to pass from the control of the state, without security against any loss by reason of these bonds. But however this may be, the constitutional prohibtion against releasing the lien, the provisions of the ordinance for the levy of a severe tax on the gross receipts, the direction for a sale if it was not paid, and the two provisions against restoration it to the same company until full payment, indicate to my mind the unmistakable determination of the convention and the people that the companies should, in the language of the prescribed ballot, "*pay their bonds*,"—pay them in full,—or lose their roads, their property and franchises.

The answer made to all this is, that while the legislature could not release the *lien* they could not remit the *debt*. That while they could not restore the road to the same company after the state had bought it in, they could sell to the company the debt which that company owed the state at any price it chose. That while the state could not release the lien by any legislative act, it could compromise or sell the debt, and thus defeat, destroy, or part with that lien.

It is said the convention intended to prohibit the legislature from dealing as it chose with the *debt*, it could easily have said so, instead of using the word *lien*. If the convention had said that the legislature shall have no power to discharge the *debt* without full payment, it could then be argued with much more force that the *lien* might be released though the debt could not be touched. On the other hand, so long as the lien remained the debt must remain, for there could be no lien without the debt. It seems to me, therefore, that the convention used the stronger and better term, the one which included both, and which expressed precisely what they meant, namely, that both the debt and the lien of the debt should remain inviolate except by payment. If there could be any doubt of this, the form of submission of the ordinance on which the people voted, that the "roads should pay their bonds," makes it too clear for dispute.

But of what avail are constitutional restrictions of legislative power, or legislative restrictions of municipal power, if they are disregarded by the legislatures and municipalities?

It may be said that there remains to the people the protection of the courts. But language is at best a very imperfect instrument in the expression of thought, and the fundamental principles of government found in constitutions must necessarily be declared in terms very general, because they must be very comprehensive.

The ingenuity of causists and linguists, the nice criticism of able counsel, the zeal which springs from a large pecuniary interest, and the appeal of injured parties against the bad faith of the legislatures who violate the constitution, are easily invoked, and their influence pursuasive with the courts, as they always must be.

And if language as plain as that we have been considering, a purpose so firmly held and clearly expressed is to be fritted away by construction, then the courts themselves become but feeble barriers to legislative will and legislative corruption, and the interest of the people, which alone is to suffer, has but little to hope from the safeguards of written constitutions.

These instruments themselves, supposed to be the peculiar pride of the American people, and the great bulwark to personal and public rights, must fall rapidly into disrepute if they are found to be efficient only for the benefit of the rich and powerful, and the absolute majority on any subject will seek to enforce their views without regard to those restrictions on legislative power which are used only to their prejudice.

My brother Davis concurs in this dissent.

Burglary—Larceny—Effect of Acquittal of One of Two Felonies Charged in the Separate Counts of an Indictment.

BELL AND MURRAY v. THE STATE.

Supreme Court of Alabama, July Term, 1874.

Present, Hon. T. M. PETERS, Chief Justice.
" " R. C. BRICKELL, Associate Justice.

1. **Rev. Code of Alabama, § 3695—What Averment in Indictment under, Constitutes Charge of Grand Larceny and not of Burglary.**—Under § 3695 of the Revised Code, a count in an indictment which charges that the defendants "broke into and entered" a certain described building mentioned in that section, and "feloniously took and carried away" certain specified personal property of a third person, "of the value of more than one hundred dollars," is a count for grand larceny and not for burglary. To constitute a good count for burglary, there should have been an averment that the breaking and entry were "with intent to steal or to commit a felony."

2. **Same—What Count Charges Burglary Only.**—A count which charges that the defendants "broke into and entered" a certain described building, included in § 3695 of the revised code, "with the intent to steal," charges burglary only, and under such a count there can be no conviction for grand larceny.

3. **Same—What Count Charges both Burglary and Grand Larceny.**—Under a count charging that the defendants "broke into and entered" a certain de-

scribed building, mentioned in § 3695 of the revised code, "with the intent to steal," and "feloniously took and carried away" certain specified articles of personal property of a specified third person, "of the value of more than one hundred dollars," there may be a conviction for either or both of the offences charged.

4. **Conviction for Grand Larceny and Burglary had under One Count—What Punishment Awarded.**—Where there is a conviction of both burglary and grand larceny charged in the same count, but one punishment should be awarded.

5. **Merger—What Offences not Subject to Doctrine of.**—Burglary and grand larceny being, under the provisions of the revised code, distinct felonies of the same grade and subject to the same nature of punishment, are not subject to the doctrine of merger.

6. **Conviction of One of Two Felonies Charged in Separate Counts of Indictment—Effect of, as to Felony not Passed on by Jury.**—A verdict finding the defendants guilty of burglary on the trial of an indictment charging, in separate counts, both burglary and grand larceny, is tatamount to an acquittal of grand larceny, and thereafter expunges that charge from the indictment.

7. **Same—Acquittal, by what not Impaired.**—The acquittal thus obtained is final, and not impaired by a judgment rendered by the appellate court, on the defendants' appeal, reversing the conviction for burglary and remanding the cause for further proceedings.

8. **New Trial on Reversal—On what Charge Defendant is Liable to be Retried.**—The acquittal of grand larceny on the first trial being final, and in contemplation of law obliterating that charge from the indictment, takes away any legal foundation for a verdict on the second trial, finding the defendants "guilty of grand larceny, as charged in the indictment."

9. **Same—What will Operate an Acquittal.**—Such a verdict is a nullity, and is no legal reason for discharging the jury from their deliberations on the charge of burglary, the only one remaining in the indictment. If the jury are discharged because of the rendition of this void verdict, without the consent of the defendants, the discharge operates an acquittal of the burglary.

10. **Acquittal—When Supreme Court will Order Discharge of Defendants from Custody on Reversal of Judgment of Lower Court.**—In the case at bar, defendants having been acquitted of grand larceny on the first trial, and the unauthorized discharge of the jury, on the second trial, being tantamount to an acquittal of the charge of burglary, the whole indictment was disposed of, and the defendants thereby entitled to their discharge. Such a motion having been made and overruled in the court below, the supreme court, on appeal, reversed the judgment and sentence of the court below, and caused the appropriate order to be entered in this court, discharging the defendants.

Appeal from the City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

The indictment in this case contained four counts. The first count was *nolle prossed*. The second count charges that the defendants, Bell and Murray, "broke into, and entered, a building which it described, in which "goods, merchandise, trunks, silverware, etc., were at the time kept for deposit, with the intent to steal," against the peace, etc., etc. The third count charged that the defendants "broke into, and entered, a building," described in the count, in which merchandise, silverware, trunks, etc., "were at the time kept for deposit, and feloniously took and carried away" certain specified articles of personal property, "of the value of more than one hundred dollars, the property of Mrs. Georgia E. Saffold," against the peace, etc. The fourth count was identical with the third, with the exception that it charged that the breaking and entering were done "with the intent to steal."

At the spring term, 1873, of the city court, the defendants having gone to trial on plea of not guilty, were convicted of burglary. The verdict of the jury was, "we, the jury, find the defendants, Richard Bell and George Murray, guilty of burglary." The judgment entry, after reciting the empanneling of the jury on the 26th of March, 1873, the defendants' plea, etc., and the verdict of the jury, concludes, "and the said defendants were remanded to jail to await the sentence of the court." The record shows that on the 2d of April, 1873, the court sentenced the defendants in accordance with the verdict. There is nothing in the record or bill of exceptions to show that the defendants either consented or objected to the discharge of the jury.

The criminating evidence against the defendants on that trial, was the recent and unexplained possession of the stolen property, taken at the time of the burglary, which property Bell and Murray were endeavoring to sell under very suspicious circumstances at the time of their arrest. The defendants appealed to the supreme court, which "reversed and annulled the judgment and sentence of said city court," and remanded the cause "to the said city court for further proceedings therein," on the ground that the court below erred in not allowing the defendants a peremptory challenge to a juror. See the case reported 50 Ala. 675, which, for convenience of citation, has been called Murray and Bell v. The State.

At the spring term, 1873, of the city court, when the case was again called for trial, the defendants pleaded their joint and separate plea of *autrefois acquit* as to each and all the charges of grand larceny contained in the several counts of the indictment. This plea was, in short, by consent, and was based upon the verdict and matters and things of record on the former trial, including the bill of exceptions then reserved, and the judgment of reversal rendered by the supreme court. The court sustained a demurrer to the plea, and the defendants pleaded not guilty to the indictment, and went to trial on issue joined by the state on that plea By consent, the testimony contained in the bill of exceptions, reserved in the former trial, was introduced in evidence, and that was all the evidence offered. The verdict of the jury was, "we, the jury, find the defendants guilty of grand larceny, as charged in the indictment, and recommend them to the mercy of the court."

The defendants moved in arrest of judgment, on the ground that it appeared from the records of the court in the identical cause, that the defendants had, at a former term, been acquitted on the identical indictment in the present case, of the identical and same offence of which the jury found them guilty in the present case, which acquittal was still of force, etc., etc.

They also moved the court to discharge them from custody, and to render judgment of acquittal, notwithstanding the verdict, of all the charges contained in the indictment, on the ground that the proceedings in the former trial were equivalent to an acquittal of the charge of grand-larceny, and the proceedings on the second trial were equivalent to an acquittal of the charge of burglary; whereby the whole case was at an end, etc.

The court overruled both of these motions and sentenced the defendants, in accordance with the verdict, for grand larceny.

The defendants appeal, and here assign for error—

1. Sustaining the demurrer to the plea of *autrefois acquit*.
2. Overruling the motion in arrest of judgment.
3. The refusal to discharge the defendants.

Thos. G. Jones and J. M. Falkner, for appellants.

1. None of the counts which did not charge the breaking and entry to have been felonious, or in the language of § 3695 of the Rev. Code, "with the intent to steal or to commit a felony," charge burglary. The breaking and entry may have been lawful, as where a man breaks into a house to extinguish a fire in the building, and afterwards commits a larceny. Where the intent with which the breaking, etc., is done, is not directly alleged, the court cannot say, as matter of law, that *burglary* is charged. A *jury*, on the facts charged in the third count, might find either a verdict of burglary or not as they found the *intent*. If this be so, all presumptions being solved against the indictment and in favor of the defendant, the court cannot hold that count as charging burglary. State v. Merrick, 19 Maine, 398; Arch. Crim. Pleading, vol. 2, p. 328; 2 Hale, 184. As to difference between alleging the fact of an unlawful intent and the facts from which it arises, see Bliss v. Anderson, 31 Ala. 625.

2. The verdict of "guilty of burglary," on first trial, operated an acquittal of all the charges of larceny. 3 Ala. 200; 6 Ala. 200; 28 Ala. 82.

3. A judgment, on conviction or acquittal, is not necessary in order that either may constitute a bar to another indictment for the same offence. 14 Ohio, 295; 5 Yerger, 24; 25 N. Y. 506; 44 Ala. 10; 43 Ala. 402.

4. Burglary and larceny are separate and distinct offences; neither is a grade or degree of the other. 2 Hale, 245; 46 Ala. 721; 24 Conn. 57.

5. These offences are not subject to the doctrine of merger under our law. Hamilton v. The State, 36 Indiana, 286; Whart. Am. Crim. Law, vol. 1, § 564; 29 Ala. 62.

6. The jurisdiction of the supreme court, on appeal, in a criminal case, arises from the statute and the waiver by defendant of so much of his constitutional right not to be twice tried for the same offence, as will give it the right to order retrial. The waiver will not be presumed to go beyond defandants' necessities. The appeal was not from the acquittal of larceny, but from the conviction of burglary. If defendants had been wholly acquitted, no court would have had jurisdiction of an appeal, and the principle is not different as to the offence of which the defendants were acquitted, because at the same time there was a conviction and sentence for another offence. Hurt v. State, 25 Miss. 374; 1 Bishop Crim. Law (Ed. 1857), § 677; 40 Ala. 14. There is no warrant in the constitution authorizing a court to require a defendant to barter away his acquittal as the price of the revision of an illegal conviction.

7. On the second trial defendants could not be retried for the offence of which they had been acquitted by reason of the verdict and proceedings on the first trial. They should have been tried for *burglary* alone. Campbell v. The State, 9 Yerger, 338; Martin v. State, 30 Wiscon. 222; Gilmore v. State, 4 Cal. 337; State v. Ross, 25 Missouri, 32; State v. Kettleman, 35 Missouri, 105; Gunther v. People, 25 N. Y. 406; State v. Tweedy, 11 Iowa, 351; Mounts v. State, 14 Ohio, 295; Morman v. State, 24 Mississippi, 51; 1 Swann, 14; 6 Humphries, 410; 2 Tyler, 471; 2 Va. Cases, 311; ; 8 Robinson (La.), 185; United States v. Keen, 1 McLean, 429; 8 Smedes & Marshall, 576; 4 Scammon, 168; 7 Blackford, 186.

8. No charge of grand-larceny being contained in the indictment, on the second trial, the verdict of guilty of grand-larceny on that trial was a nullity. It was no reason for the discharge of the jnry. That discharge was unauthorized and operated an acquittal of the burglary. Having been acquitted of larceny on the first trial, and the discharge of the jury on the second trial being equivalent to an acquittal of the other charge, the whole case is ended and the defendants entitled to their discharge. McCauley v. State, 26 Ala.; *Ex parte* Vincent, 43 Ala. 402; Grogan v. The State, 44 Ala. 10.

Attorney-General *Gardner* and *Sayre & Graves, contra.*

On an appeal of a case to the supreme court, and a reversal thereof, the case stands precisely as though a new trial were granted, or as though it had never been tried, and the court must try it over as it originally did, unless some count in the indictment is decided by this court to be bad.

In North Carolina and South Carolina, where a defendant is acquitted upon one count of an indictment and convicted on another, and appeals, if a *venire de novo* is awarded, it must be to retry the whole case. The State v. Stanton, 1 Iredell, 424; The State v. The Commissioners, 3 Hill, S. C. 239.

Where a defendant being indicted for burglary and larceny, according to the ordinary form, in one count, was acquitted of the burglary but convicted of the larceny, and obtained a new trial, it was held that the revision of the case pervaded the whole indictment, and that on the second trial he was to be arraigned on the burglary as well as the larceny portion of the count. State v. Morris, 1 Blackford, 37.

So the Circuit Court of the United States for the Eastern District of Pennsylvania held, that after a new trial on a conviction for manslaughter, the charge of murder was reopened. U. S. v. Hardin, 6 Penn. L. J. 23; 1 Wall., p. 127. In this case Justice Grier says, to a party of prisoners who applied for a new trial, having been convicted of manslaughter in said court, "Let me now solemnly warn you to consider well the choice you shall make; another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law, * * * * * and when your solemn election shall have been put upon record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you."

In burglary and larceny, where, after the acquittal of the greater offence, but conviction of the less, a new trial is granted, the whole case is said to have been opened, and the defendant exposed on the second trial to the double charge. The State v. Morris, 1 Blackf. 37; Morris v. The State, 8 S. & M. 762; Esmon v. State, 1 Swann (Tenn.), 14; State v. Kittle, 2 Tyler, 471.

The decisions in this state, on which the defendants will rely, are The State v. Coleman & Owen, 3 Ala., p. 14, and Martin & Flinn v. The State, 28 Ala. 71. The point decided in these cases was not made by the record, nor did it come into question in either case. Besides, they are not applicable to the case at bar; these and all the other decisions cited by the defendants' counsel, it will be observed by the court, are cases where the conviction was of a lower grade of offence, and the court held that it amounted to an acquittal as to the higher grade of offence, and the authorities are by no means uniform as to this doctrine, and we do not think it the settled law of the land.

But the defendants do not cite a *single case* where a conviction of a higher offence is a bar to a prosecution for a lower offence, of a kindred kind, because the smaller offences are embraced in the greater. This is a conviction of burglary, as in the case at bar, and includes all the minor offences of a kindred kind; it includes that of grand larceny.

Take, for instance, the case of Stokes, which so recently engaged the public mind. He was first found guilty of the *murder* of Fisk; the case was reversed by the New York Court of Appeals. On a second trial, he was convicted of *manslaughter.* Do we hear of any plea on his behalf, on the second trial, that he was *acquitted* of manslaughter, by the first verdict, of *murder?* Do we hear of any motion in arrest of judgment on the above ground? Would the court have entertained a plea so contrary to all reason. Such a decision would be the abrogation of the criminal code. Take an appeal, as in the case at bar, on some technicality, have the case reversed, then plead a former acquittal as to all the counts in the indictment, except the one found on, then risk the jury finding on some other count; if they miss it on the first appeal, try it again and again, and finally it would be impossible to convict, it matters not what would be the magnitude of the crime.

The proposition asserted, virtually, by the defendants' counsel is, that *two convictions* are in fact an acquittal.

BRICKELL, J.—A paradox is a proposition seemingly absurd, yet true in fact. An instance is, that under the constitution and laws of Alabama, and under an indictment charging the defendant with two distinct felonies, two verdicts rendered at different terms of the primary court, the first expressly finding him guilty of one of the felonies, the second expressly finding him guilty of the other, may, when accompanied by an unauthorized discharge of the second jury, amount to an acquittal, and operate as such.

Section 9 of article 1 of our state constitution, provides: "That no person shall be accused, arrested, or detained, except in cases ascertained by law, and according to the forms which the same has prescribed; and that no person shall be punished but by virtue of a law established and promulgated prior to the offence, *and legally applied.*"

Section 2 of article 6 of that constitution, is in the following words: "Except in cases otherwise directed in the constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions and regulations, not repugnant to this constitution, as may from time to time be prescribed by law."

The restrictions and regulations as to the appellate jurisdiction of the supreme court in criminal cases have been prescribed by

law and are contained in chapter xii, title 3, part iv, embracing §§ 4302 to 4316, inclusive, of the revised code of Alabama. Section 4302 declares, that any question in law arising in any of the proceedings in a criminal case tried in the circuit or city court, may be reserved by *the defendant, but not by the state*, for the consideration of the supreme court, and if the question does not distinctly appear on the record, it must be reserved by bill of exceptions duly taken and signed by the presiding judge as in civil cases. By the sections of the code above recited, the defendant in any criminal case, but not the state, may take the case to the supreme court by appeal or writ of error; and in any case taken to the supreme court under the provisions of said chapter, no assignment of errors, or joinder in error, is necessary; but "the court must render such judgment as the law demands;" and if it reverses the judgment of the primary court, may order a new trial, or the discharge of the defendant, "or make such other order as the case may require." Rev. Code, § 4314, 4316.

In the language of Chief Justice Gibson, "our jurisprudence abounds with unreasonable advantages enjoyed by the accused. The least slip in the indictment is fatal; *a new trial cannot be awarded after an acquittal produced by the most glaring misdirection;* and the prisoner is to be acquitted whenever there is a reasonable doubt of his guilt. These, and many other unreasonable advantages, the law allows on principle of humanity or policy." * * * * * "But feeling, as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even a hair of any privilege of a prisoner," etc., etc. The Commonwealth v. Lester, 17 Serg. and Rawle, 164.

The indictment here to be considered was found at the February term, 1873, of the City Court of Montgomery, and consists of four counts. The first count was *nol prossed*. The second charges that the defendants "broke into and entered a building," described in that count, "with the intent to steal." The third count charges that the defendants "broke into and entered a building," described as in the second count, "and feloniously took and carried" away certain specified articles of personal property of a specified third person, "of the value of more than one hundred dollars." This third count contains no averment as to the intent with which the defendants broke into and entered the building. The fourth count charges that the defendants "broke into and entered a building," described as in the second and third counts, "with the intent to steal, and feloniously took and carried away" personal property, as described in the third count, "of the value of more than one hundred dollars."

Under § 3695 of our revised code, which defines burglary differently from the common law, the second count is a count for burglary only, and does not include, nor authorize a conviction for the offence of grand larceny. Fisher v. The State, 46 Ala. 720.

Under the definition of burglary, contained in that section of the code, the third count is not a count for burglary, because it contains no averment that the defendants broke into and entered the building "with intent to steal or to commit a felony." An averment of the existence of the intent to steal or to commit a felony, at the time they broke into and entered the building, was essential to make that count a good one for burglary. Oliver v. The State, 17 Ala. 587; Ogletree v. The State, 28 Ala. 693; Moore v. The Commonwealth, 6 Metc. R. 243. As that count did not contain such averment, it is a count for grand larceny only. The fourth count is a count for burglary and grand larceny; and under it, the defendants might, on the first trial, have been convicted of either, or of both of these offences. But if they had been convicted of both, under that count, there could have been but one penalty, because, in that event, the merciful and just construction in favor of the defendants would have been, that as both offences were charged *in the same count*, they should be deemed as "one continued act," for which but one penalty could be adjudged. Josslyn v. The Commonwealth, 6 Metc. R. 236.

Under our code, burglary and grand larceny are distinct felonies of the same grade, subject to the same nature of punishment, and may be joined in the same indictment, but are not subject to the doctrine of merger. Johnson v. The State, 29 Ala. 62; Hamilton v. The State, 36 Ind. 286; Wilson v. The State, 37 Ala. 134; Whar. Amer. Crim. Law, vol. 1, § 564.

When the defendants were put on trial under this indictment, at the February term, 1875, of the City Court of Montgomery, and evidence as to their guilt was submitted to the jury, they were in jeopardy, both as to burglary and larceny; and might have been convicted and punished for both under the *distinct counts* of the indictment. Josslyn v. Commonwealth, 6 Metc. R. 236.

If, on that trial, the verdict of the jury had been, "we, the jury, find the defendants guilty as charged in the indictment," or, "we, the jury, find the defendants guilty of burglary and grand larceny as charged in the distinct counts of the indictment," they certainly could have been tried again for both burglary and grand larceny, after they had brought the case to this court and procured a reversal of the judgment of the city court.

But on that trial, the verdict was, "we, the jury, find the defendants, Richard Bell and George Murray, guilty of burglary." That verdict was received by the city court, and judgment and sentence thereon entered by that court, against the defendants, to the effect that each of them be confined in the penitentiary for specified periods.

The defendants thereupon took the case to the supreme court under the provisions of the code above cited. And at the June term, 1873, this court reversed the said judgment and sentence of the city court and remanded the case to that court "for further proceedings."

As the indictment was for burglary and grand larceny, and the verdict was only for burglary, the necessary intendment of the finding was, that the defendants were not guilty of the alleged larceny." "As to all which is not found, the conclusion must be that the jury intended to acquit." Nancy v. The State, 6 Ala, 483; Nabors v. The State, 6 Ala. 200; Burns v. The State, 8 Ala. 313; Martin and Flinn v. The State, 28 Ala. 71, and authorities cited in appellant's brief.

The legal effect of that verdict of acquittal of larceny, whether any judgment was rendered on it or not, was to put the alleged larceny as completely out of the indictment and case as if it had never been in the indictment or case. Mount v. The State, 14 Ohio, 295; Shepherd v. People, 24 New York, 406; The State v. Martin, 30 Wisconsin, 223; People v. Gilmore, 4 Cal. 376; Hurt v. The State, 25 Miss. 378; Campbell v. State, 9 Yerger, 333; 1 Bish. Crim. Law (Ed. 1856), § 676; State v. Ross, 29 Missouri, 32; Jones v. State, 13 Texas, 168; Morris v. State, 8 Smedes and Marshall, 762, and authorities in appellant's brief.

The case, when brought by the defendants to this court at its June term, 1873, had, by the aforesaid proceedings in the city court, become a case for burglary only. This court was bound to treat it as such; and in reversing the judgment and sentence of the city court, at the instance of the defendants, the supreme court had no jurisdiction to deprive them of the advantages which the law gave them as the result of the final verdict. The jurisdiction of this court, in the case as brought, was appellate only. As the case when brought here, had become one for burglary only, it remained a case for burglary only when remanded to the city court. Authorities, *supra*.

After the case was thus remanded, the city court, in effect, required the defendants not only to be tried for the alleged burglary, but again to be put in jeopardy for the alleged larceny, of which they had been acquitted as aforesaid. They were put on trial for both burglary and grand larceny, precisely as if there had been no former trial or former verdict. On this trial, at the February term, 1874, of the city court, the same evidence which had been adduced on the former trial was introduced, but the verdict was,

"we, the jury, find the defendants guilty of grand larceny as charged in the indictment, and recommend them to the mercy of the court." The city court received this verdict, remanded the defendants to jail to await sentence, and discharged the jury. No consent of the defendants to this discharge of the jury appears, and such consent cannot be presumed.

If this last verdict were of any validity, its undoubted effect and meaning in law would be, that the jury found the defendants not guilty of burglary. But that verdict is a mere nullity, because the charge of grand larceny had been put out of the case by the verdict and proceedings on the former trial. Fisher v. The State, 46 Ala. 721.

A verdict which is a mere nullity, is no legal reason for the discharge of the jury. And when, as here, that is the only reason for the discharge of the jury, and there is no evidence that the defendants consented to such discharge, the legal effect of such discharge is the acquittal and discharge of the defendants from any further prosecution for the offence or offenecs set forth in the indictment. *Ex parte* Vincent, 43 Ala. 402; McCauley v. State, 26 Ala. 135.

It is not the verdict finding defendants guilty of grand larceny on the last trial which acquits them of burglary. At the time of that trial, there remained in law no such charge as grand larceny in the indictment. That which acquits defendants on the last trial, is not the void verdict, but the discharge of the jury, charged with the trial of defendants for burglary, without necessity and without their consent. The void verdict had no effect. The jury should have been instructed to return to their deliberations. As the jury was not so instructed, but was discharged without a verdict on the only charge by law it was authorized to consider, and without consent of defendants, that dispersion of the jury operated an acquittal. So, on the first trial, when defendants were in jeopardy for both burglary and larceny, the discharge of the jury without rendering a verdict as to larceny, and without consent of defendants (although it did render a verdict as to burglary), operated an acquittal of the larceny. This is one of the strongest and most logical reasons for the rule, that where defendants are put on trial on several counts, and the jury find only as to one, the defendants are thereby acquitted as to the others.

It is a settled rule in this state, that the unauthorized discharge of a jury, charged with the trial of a defendant in a criminal case, is tantamount to his acquittal of all the alleged offences upon which the jury did not expressly pass, or were prevented from passing by the unwarranted discharge. From this rule it follows, that where two charges are contained in an indictment, and on the first trial there was a discharge of the jury without necessity and without consent of defendants before the jury had passed, and whereby they were prevented from passing on the first offences, that discharge is tantamount to an acquittal of the offence not passed on. If, on the second trial, the jury, which then, *in law*, are charged to inquire into the second offence only, are discharged without necessity, and without defendants' consent, that discharge operates an acquittal of the second and only remaining offence, whereby defendants are freed from the whole charge.

Strictly speaking, then, it is not the two verdicts against the defendants in the present case which operates an acquittal, but the unwarranted discharge of the jury on the last trial, as shown by the record.

We have been aided in our investigations of this case, and the important and delicate questions it involves, by the elaborate and exhaustive briefs of the counsel for the appellants, creditable to their industry and discrimination. To these we refer as containing the citation of many authorities not cited in this opinion, sustaining the conclusion we have reached.

The judgment of the city court is reversed, and a judgment must be here rendered discharging the appellants.

SAFFOLD, J., not sitting, being related by marriage to the prosecutor.

NOTE.—For the above highly interesting and important decision, we are indebted to Thomas G. Jones, Esq., the able reporter of the decisions of the Supreme Court of Alabama, by whom it was prepared for publication as we print it, and as it will appear in a future volume of his reports.

[Communicated.]

Lawyers' Libraries.

EDITORS CENTRAL LAW JOURNAL:—One of the greatest and most annoying difficulties which lawyers meet with in the preservation of their libraries, arises from the very general and unavoidable practice of borrowing, which prevails in all places except, perhaps, the largest cities of the country. While many books are doubtless lost by the carelessness of their owners, the great number which get misplaced from the negligence of those who borrow, is one of the sorest grievances of this much abused and long-suffering profession. It is one for the prevention of which very many devices have been planned and attempted, most of which have proved utter failures, and all of which are subject to countless objections.

If a lawyer, after great trouble and much ill-afforded expense, has succeeded in securing a good library, large or small, it is a constant laceration of his tenderest feelings to see his shelves gradually becoming depleted and his treasured volumes gone—he knows not whither. He may post up a flaming notice on his office wall, entreating his brethren, with the most touching earnestness, to "leave a memorandum of books borrowed," even adding, sometimes, an expression of his extreme readiness to allow his books to be taken, and may provide a neat little book, with a string and pencil, in which to enter the name and number of the volume taken in his absence; he may issue the most positive and overwhelmingly minute instructions to his office-boy to insist on requiring the borrower to make the entry or give his name and address so that the entry may afterwards be made; he may in his notice threaten the "utmost rigor of the law," if books taken are not punctually returned; he may do anything, adopt a thousand different plans, one after another, as his puzzled fancy may suggest, to save his precious books, but all in vain. The inexorable borrower prowls on among his treasures, in season and out of season, regardless of his entreaties and despair, until at last his rarest sets of reports are broken up, his most valuable text-books are missing without trace, and his once perfect and almost invaluable library is a mere wreck and shadow of its former glory; and every time "the law-book man" comes around, he must deny himself the pleasure and profit of buying some new book, "just out, the very thing he wants," in order that he may make good the depredations of the borrowers.

If he selfishly locks up his cases, he will soon have the unenviable reputation among his fellows of "a stingy fellow," and, moreover, cannot himself go out to borrow with a good grace, for be it known that he, himself, is a *great borrower*, withal. In other words, the practice is so common, so universal and so unavoidable, that none can say, as some pretend to do, that they "neither borrow nor lend."

The object of this communication is to suggest to the profession a remedy for this great and growing evil.

Let all the lawyers of a town or city unite in the employment of some worthy, quick and capable young student, whose duty it must be to make out and keep up a complete, classified catalogue of every library in the place. This catalogue should show every book in every library, its date, edition, editor and owner, and copies of the original (which should not leave the custody of the librarian), could be furnished by the librarian, at a slight cost, to every lawyer who desires it. It should be the duty of this librarian to make frequent periodical visits to each library, noting changes, loans and returns, books missing and found, and to "keep the run" of every volume, searching for those unaccounted for, and as far as possible, keeping all in their proper places. This labor, once reduced to a system, would be very slight, and the compensation therefor, contributed by so many, could be easily adjusted, and paid without hardship to any individual.

If there exists no law association through which the matter could be arranged, let some enterprising student take hold of it and secure subscriptions, or go on without subscriptions, and as soon as the utility and value of the plan is demonstrated, every lawyer who has the slightest feeling of regard for his books, or sentiment of justice and gratitude for a service rendered, will gladly join in the good work.

Besides this, the simple contact with the books, and acquired familiarity with their names, dates, editions, editors, authors, contents and relative value, will, in itself, furnish the librarian with a fund of information scarcely less valuable than his course of reading.

Trusting that I have not trespassed too largely on your space, and that good may result from my suggestion, I am, etc., C.

Book Notices.

A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES. By JAIRUS WARE PERRY. Second Edition, in two Volumes. Boston: Little, Brown & Co. 1874. Sold by Soule, Thomas & Wentworth, St. Louis.

It is gratifying to the pride of American lawyers to know that the bold undertaking of Mr. Perry, to produce a work that should rival the excellent English Treatises of Mr. Hill and Mr. Lewin on the Law of Trusts and of Trustees, has been successful.

Mr. Perry's work covers all the ground which is included in the English Treatises named, and he illustrates these subjects with the aid of American judgments, and in addition thereto his work embraces matters which are peculiar to the jurisprudence of this country, or have here received their fullest development.

The plan of Mr. Perry's treatises is comprehensive, embracing everything that fairly belongs to the Law of Trusts, whether gxpress or Implied, Resulting or Constructive, including Executory trusts, trusts under Wills, under Assessments for Creditors, under Mortgages and Deeds of Trust with power of sale, trusts for Infants and Married Women, for Charitable Uses, and for the benefit of Bondholders and Railway Mortgages, and other trusts which need not be here more particularly enumerated.

Of course the execution of this plan involves a discussion of the origin, definition and character of Trusts in the Roman and English Law, the Parties to trusts, and the Property that may be the subject of a trust, the nature of the Estate taken by the trustee, the powers and duties of trustees, and the remedies which they may apply and which may be applied against them.

All these subjects and others, which are subsidiary and incidental, are discussed by the author with a pains-taking care and accuracy, with a fullness of learning and precision of statement, that has placed his work in the very first rank of legal productions.

The vast extent of the field which Mr. Perry's labors embraces, is shown by the fact that his two volumes contain 1265 pages of *condensed* law, in which it is difficult to find a redundant statement or expression, or more than an occasional paragraph made up from quotations from individual jndgments.

The thoroughness and minuteness of the work is endorsed by the fact that the table of cases occupy 108 double-column pages, which is explained by the circumstance that it has been the purpose of the author to cite *all* the cases down to the date of publication, on the subjects treated. The reasons for doing this are satisfactory. In this country we have forty States, each making law and publishing judicial decisions. Besides this, there are the Federal Courts sitting in the various States, and the Supreme Court of the United States. In only the larger places can complete law libraries be found. Some towns have the Reports of one state, and others different Reports. The usefulness of a text book is much increased by a full citation of cases. If the citations are in *exact* support of the proposition to which they are adduced, they are worth more than the space they occupy, unless the proposition is so elementary as to be universally admitted, and so clear as to leave no doubt as to its extent and application.

We cannot conclude this meagre and brief notice of the work before us, without tendering our congratulations to the author, that the merits of his production have been so soon appreciated by the profession, and that this has led to so early a demand for a second edition. We could have wished it possible that the matter could have been put into one volume, for sake of economy and convenience, but a book of nearly 1300 pages, on good paper, cannot be handled, and since two volumes were found necessary, we venture to think they would have been yet more acceptable had the notes been more full of illustrations, judiciously drawn from well-considered judgments, of leading courts or eminent judges. But it is scarcely gracious, where so much has been furnished, to complain that more has not been given.

THE INTERNATIONAL REVIEW. Bi-Monthly. $5 00 per annum; single numbers $1 00. A. S Barnes & Co., Publishers, 111 and 113 William street, New York; 113 and 115 State street, Chicago.

The International Review, for January, will contain:

Judge T. M. Cooley's (of Michigan) "Guarantee of Order and Republican Government in the States," which discusses the legitimacy of the executive interference in such cases as have arisen in Rhode Island, Arkansas, Louisiana, and other states. This is one of the ablest articles that has yet appeared on this subject, and will be likely to attract wide attention in political circles.

Dr. McCosh's (of Princeton) "Ideas in Nature Overlooked by Dr. Tyndall." Marked interest has been evinced in this expected reply to the great Belfast address. Numerous extracts having appeared from Dr. McCosh's lecture and reported conversations, we desire to state that this article is written expressly for the readers of the International Review, and is a new, and the only original exposition of his views.

The Association for the Reform and Codification of the Laws of Nations, by Dr. James B. Miles, Secretary of the Association, Boston. A present and conspicuous need among nations, is a well-digested code of international law, and an International Tribunal to settle the differences of nations, not adjusted by the ordinary methods of negotiation.

The work undertaken by this Association, and its history, are of the utmost importance to the whole world, and no other American has a more intimate knowledge of it than Dr. Miles.

Vienna and the Centennial, is the title of a timely article by Prof. J. M. Hart, of New York. It is an inteligent description of that magnificent failure, financially, of 1873, and maps out some dangerous shoals for our centennial commission to avoid.

The following *foreign articles* are also of present importance:

The University System in Italy, by Prof. *Angelo de Gubernatis*, Florence; and Baron Liebig, by his successor in the chair of Agricultural Chemistry, Munich, Prof. *August Vogel*.

A TREATISE ON THE LAW OF NELIGENCE. By FRANCIS WHARTON, LL.D., author of "Conflict of Laws," "Criminal Law," and "Medical Jurisprudence." Philadelphia: Kay & Brother, 1874. Sold by Soule, Thomas & Wentworth, St. Louis.

This is a new and comprehensive work of 880 pages, divided into 1001 sections. We received it some weeks since, but have refrained from noticing it until we could give it a careful examination. The result of that examination is the conviction that the work is one of extraordinary merits. It differs in its mode of treatment from the excellent practical treatise of Shearman & Redfield, which is devoted almost exclusively to an exposition of the law of Negligence, as developed in the common-law tribunals of Great Britain and this country. On the other hand. Dr. Wharton has produced a work intended to be thoroughly practical, and at the same time philosophical. All that has been said of value on the subject of Negligence in the Roman law, and by the modern jurists of continental Europe, is given by the learned author, and in addition the views and judgments of the eminent judges and writers of the two great countries which have the common law for the basis of their jurisprudence.

The most valuable feature of the work is the successful manner in which the author has combined original and philosophical discussions, and the results of the best thought and reflections of the great jurists of the civil law, with a full and minute view of the adjudicated cases in England and America.

None but a writer of Dr. Wharton's learning and experience in the preparation of legal works, could have produced such a treatise as the present. Nothing seems to have escaped the diligence of the author, who even cites cases as yet only published in the current legal periodicals.

It is impracticable, in the limits of a notice, to descend into details, but we may remark that the author's chapters on the Master's Liabilities *to* and *for* Servants, on Contributory Negligence, including Injuries to Children, on the Negligence of Railways and other Corporations, are noticeably thorough and valuable.

One of the most marked features of the work is the demonstration of the author that the three degrees of negligence which Sir Wm. Jones and Lord Holt have done so much to engraft upon the common law, have no basis in the Roman law, and is a refinement which the practical sense of the modern judges has repudiated.

After the luminous and learned exposition of the author on this subject, no one can hereafter doubt that the doctrine of *culpa levissima* (*slight* negligence as a ground of actionable liability) is derived from the speculations of scolastic medieval jurists, and not from the Roman law, and that it is now practically discarded in England and America, and is, in fact, a subtlety which cannot be applied to the practical affairs and business of life.

The author's conclusions on this subject, which affects the whole doctrine of negligence, are thus stated:

"§ 58. (1.) That the doctrine of a third grade of *culpa* (negligence), called *culpa levissima* [or the omission to ward off every possible casuality, the antithesis of the most exact diligence], is taken by Lord Holt and Sir William Jones, not from the classical Roman law, which was the law of business Rome, but from the scholastic jurists, who dealt with the question as belonging rather to speculative than to regulative jurisprudence.

"(2.) That by present authoritative expositions of the Roman law, it is rejected.

"(3.) That while it lingers still in Anglo-American text-books [notably Story on Bailments], it is practically dropped by Anglo-American courts

"(4.) That it is incompatible with the necessities of business jurisprudence.

"(5.) That the classification into two degrees, *culpa lata* (gross negligence) and *culpa levis* (slight or special negligence), is sufficiently exact for all philosophical purposes and sufficiently flexible for the purposes of practical jurisprudence."

In executing his plan the author divides his work into three books. The first, containing eleven chapter, treats of the General Principles appertaining to

the subject. The second, divided into twenty chapters, treats of Negligence in the discharge of *duties based on contract*. The third, comprised in twelve chapters, is devoted to Negligence in the discharge of duties *not* based on contract

We may observe, before closing, that the author falls into a slight error in one respect in giving the substance of the interesting case of Kellogg v. Milwaukee and St. Paul Railway Co., tried before Miller and Dillon, JJ., in the U. S. Circuit Court for Iowa, at the May term, 1874, and first published in the CENTRAL LAW JOURNAL, June 4, of that year. In this case the defendant company owned a steam ferry boat (the Jennie Brown), and an elevator more than 100 feet high, constructed of pine, situated on the bank of the Mississippi river. During an unusually high wind blowing in the direction of the plaintiff's lumber yard and mill, distant 388 feet from the elevator, the saw-mill and lumber yard took fire from the burning elevator, and were destroyed. The plaintiff's action was for the value of the mill and lumber thus consumed, and he alleged that the defendant's negligence caused the elevator to catch fire, and that this was the immediate or proximate cause of his loss. The defendant's negligence was alleged to consist in the omission to use "spark-arresters" on the chimney of the Jennie Brown, and in not using due care, in view of the violent wind then prevailing, in working the boat while in the immediate vicinity of the combustible elevator, to prevent sparks from coming in contact with it. The author states (sec. 154) that "the defendant was clearly guilty of negligence in not having spark-arresters to his smoke-pipe." This is doubtless a true proposition of law with regard to railway locomotives, running in settled regions of country. Ib. sec. 874. But on the trial of the case of Kellogg, the evidence tended quite clearly to show that spark-arresters could not be successfully used on the boats navigating the Mississippi, and that from necessity they had to be abandoned. Under the testimony, it was left to the jury to determine whether the neglect to use them was negligence, and the jury in finding for the plaintiff, must, under the evidence, have proceeded upon some other ground than the one that "the defendant was clearly guilty of negligence in not having spark-arresters to his smoke-pipe."

We have not space further to extend our notice of this most interesting and valuable book. It will add to the already distinguished name of its author, and the work, surpassing in the richness of its materials, and in masterly and exhaustive treatment, the English treatises on Negligence, by Mr. Saunders and by Mr. Campbell (both published in 1871), cannot fail to give him an enviable and enduring European fame. We unreservedly commend it to our readers, not only as a work of immense learning, and abounding in acute and philosophical discussions, but also as one of great practical, every-day value.

Summary of our Exchanges.

Middleton v. New Jersey, etc., Railroad Co., Chicago Railway Review for Dec. 5, has the following syllabus: The New Jersey statute, which provides that where the property of an insolvent corporation, in the hands of a receiver or trustees appointed under the original act, is incumbered with mortgage or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation thereupon, the court of chancery may order the receiver or trustees to sell the same, clear of incumbrances, at public or private sale, for the best price that can be obtained, bringing the money into the court of chancery, there to remain subject to the same liens and equities of all parties in interest as was the property before it was sold, and to be disposed of as the said court by its decree shall order and direct,—pronounced constitutional.

White v. Freedmen's Bank, Sup. Court, Dist. Columbia, Washington Law Reporter, Dec. 1: 1. Leased premises were used as a hotel, and the lessee executed trust deeds on the furniture to secure the parties from whom he purchased, and to other creditors. Subsequently the landlord accepted in lieu of the lessee, another tenant, who bought out the lessee and assumed the payment of all rent in arrear, and of all liens upon the furniture. Upon the faith of this agreement, the tenant paid all the back rent, and the rent accruing for some time afterward, to the landlord. He also paid off a large portion of the claims secured by the deeds of trust. Held, that the balance due upon such trust deeds had priority over the landlord's lien for rent, and that there was a change of tenantry as well as of property in the furniture.

2. A landlord will lose his lien by conduct which misleads *bona fide* purchasers for valuable consideration.

3. Where trustees have money in their hands, claimed by a landlord upon his lien for rent, and by creditors having trust deeds on the furniture on the rented premises, a bill of interpleader will be sustained when the fund is not sufficient to pay both.

Norment v. Fastnaght, same court, same journal:

An expert cannot give his opinion, whether upon the face of a conveyance of real estate, it covers the premises in controversy.

Ex parte Dewitt C. Baxter, same court, same journal:

1. An improvement described in the claim as "The combination of the hearth-plate of a portable furnace with wrought-iron tubular legs connected together, all substantially as set forth," does not indicate, in any degree, invention. It is simply the result of the judgment and knowledge which is expected of every competent mechanic, and is not patentable.

2. The properties and advantages of hollow wrought-iron legs as supports for a structure, being well-known, to substitute them for solid legs in a portable forge, is but the application of knowledge already possessed by competent mechanics, and does not require invention.

The same journal publishes a decision of the secretary of the interior, with the following syllabus: 1. A state selection has the effect of an entry of the land selected, and withdraws the tract from further disposal.

2. Although a state selection be abandoned, yet all settlements upon or entries of the tract, prior to the cancellation of the selection, are illegal.

Crighton v. Kerr, Sup. Court United States, Legal Gazette, December 4: A withdrawal, "without prejudice to the plaintiff," of a general appearance entered by an attorney for the defendant, means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal; that all his rights are to remain as they then stood. Hence, where there has been error in the beginning of an action, as *ex. gr.*, one of foreign attachment, by reason of want of notice required by statute to be given to the defendant, and an attorney appears generally for such defendant, and so cures the defect, the advantage thus given to the plaintiff is not taken away by a withdrawal declared to be "without prejudice" to him. And the court states that it does not intend to intimate that the result would have been different had the appearanee been withdrawn unconditionally.

Chicago and Northwestern Railroad Co. v. Chicago and Pacific Railroad Co., United States Circuit Court, Eastern District of Wisconsin, same journal, opinion by Drummond, J., holding:

1. Where the legislature of a state has not declared in what particular way one railroad shall cross or intersect another, but has only referred to it in general terms, then it may be competent for a court of equity to control the railroads as to the crossings.

2. Where a corporation is created by another state, although it may be associated with a corporation in this state, and their interests be common, a court of equity can protect the interests of a joint proprietor in property that is being injuriously affected.

Com. v. Hartranft, Pittsburg Legal Journal, Dec. 2: Jurisdiction of Supreme Court of Pennsylvania, under the new constitution.

Simonds v. Boston, Supreme Court of Pennsylvania, same journal: 1. Under the statutes 22d and 23d Car, 2, where the damages found by the jury in an action of trespass, are under the value of forty shillings ($5.33⅓), the latest time when the judge can certify that the freehold or title of the land mentioned in the declaration was chiefly in question, to give a plaintiff full costs, is at final judgment.

2. Where the trespass to the land or freehold is laid as the principal cause of action, and the asportavit of that which has been made personal property by severance, is laid in aggravation of the trespass, full costs do not follow without the certificate.

3. Where the asportavit and conversion of that which has become personal property by the act of the trespasser, is laid as a separate and distinct claim, although the plaintiff goes on to charge a trespass on the land, it does not bar his right to recover full costs without the certificate.

4. The *Narr.* charged that the defendants broke and entered a certain island and close of the plaintiff, and that they seized, took, and carried away ten thousand bushels of sand (of which the island was partially composed) of the value of five hundred dollars, and converted and disposed of the same to their own use; and that they also injured and despoiled the island, etc. Verdict for plaintiff for $5.00. *Held*, that the court below was correct in entering judgment for full costs.

Tatty v. Freedman's Trust Co., Supreme Court, District of Columbia, Washington Law Reporter, December 8: 1. A claim against the late corporation of Washington, commonly called a voucher, consisting of a bill for work performed by plaintiff for the corporation, together with certificates of the proper officers, that it was duly approved and allowed for the sum of $6.096.75, is not strictly a commercial instrument; but where it has been endorsed in blank by the plaintiff, and delivered to a broker as security to raise money, and no mark put on it to designate a wish to control it, or to restrict the endorsement, and a paper of this kind is extensively used for the purpose of borrowing money: *Held*, that he could not maintain replevin to recover the voucher from

an innocent *bona fide* holder for a valuable consideration, without tendering him the amount paid therefor.

2. Where the plaintiff made his promissory note for $3,000, payable to his own order, and endorsed it and delivered it to a broker to get discounted, giving him the voucher as security; and the note was discounted and the proceeds paid plaintiff; and the broker claimed that the voucher was given upon agreement that he might sell and dispose of it at any time for 90 cents on dollar, and the plaintiff claimed he was not to sell it until after maturity, and non-payment of the note; and the broker sold it to the defendant before such maturity, for a valuable consideration, and without any notice or knowledge of such arrangement. *Held*, upon this state of facts it was proper for the justice who tried the case below, to instruct the jury to return a verdict for defendant, as there was no proof of tender before suit brought.

Ex. parte J. L. Pennock, same court, same journal: 1. If a chain is attached to a shaft rotated by the same mechanism as the rolls in a rolling-mill, other end being furnished with grappling-irons, by which the heated pile drawn from the furnace, and placed upon a platform suspended from a crane, when it is swung by the crane to the rolls, the whole machinery constitutes the proper subject of a patent. Wylie and Olin, associate justices, dissenting.

3. And a patent is valid which describes such machinery, and contains the following claim, viz: "In a rolling-mill, the revolving shaft with its drum-chain and grapple, or any equivalent power-driven hauling mechanism, in combination with a crane, arranged and operating in connection with the said mechanism to receive the fagot from the same and deliver it at the rolls." Wylie and Olin, associate justices, dissenting.

3. Whether the inventive faculty has been exercised, is a question of evidence, and is always to be considered in reference to the condition of the art and the result accomplished; and where the combination is new, and the benefit great, the presumption is strongly in favor of originality.

The same journal publishes a decision of the secretary of the interior, holding that when a claim, under the pre emption law, is defective in the matter of citizenship, such defect cannot be cured by the retroactive effect of the United States statutes, if an adverse right has intervened.

The Albany Law Journal, for December 12, has an article by Josiah H. Bissell, Esq., of Chicago, Ill., on Limitations of Claims Against Estates. It publishes a long extract from the opinion of the New York Court of Appeals, in the case of Tilton v. Beecher, holding that a bill of particulars in an action for criminal conversation is a matter of discretion with the inferior court. It has an extract from the Irish Law Times, on the Duties of Carriers in the Protection of Goods; and contains its usual amount of other interesting matter.

The Chicago Legal News, for December 12, prints an opinion of the Supreme Court of the United States, Mr. Justice Strong, in the case of the Ship Belle of the Sea v. Higgins. This was a proceeding to enforce a bottomry lien, and the court hold that there was no evidence of actual payment, as claimed by the owners, and that the ship was not discharged from the lien unless there was actual payment of the bond, or unless the libelants agreed to pay it and look to the freights, the general average, and the insurance, exclusively, for their reimbursement.

It also prints the opinion of the New York Court of Appeals in the Tilton-Beecher bill of particulars case.

It also prints an opinion of the Circuit Court of Peoria county, Illinois, Tipton, J., holding that the city council of Peoria, has the power to determine when and where, and the expediency of, the location of the street-railroad of the city; that their determination, without fraud, is final, and the courts cannot interfere by injunction or otherwise; that under its charter the city has power to authorize onehorse railroad to locate its line upon and over the road of another company; that a company so authorized has authority to condemn the right of way or use of such other company's road for the necessary use of its cars, and that the county court has jurisdiction of such condemnation proceedings.

It also prints an opinion of the Supreme Court of Illinois, in Culver v. Third National Bank of Chicago. This was an action of assumpsit, in the Superior Court of Cook county, brought by the Third National bank of Chicago, claiming to be a creditor of the Northwestern Glass Company, against Howard Z. Culver, alleged to be a stockholder in that company. It was agreed there were many other suits depending on the decision of this, and the court therefore, gave it careful consideration. The court hold, that the act of 1867, under which the glass company was incorporated, was intended by the legislature as a substitute for the act of 1849, they at the time having the whole subject fully before them, and this being so, the stockholders are primarily liable by section nine of that act. It is also held that a creditor may pursue his remedy at law against a stockholder.

It also publishes an opinion of the same court, Sheldon, J., stating under what circumstances abstracts of title may be received in evidence in place of original deeds.

The Legal News contains considerable other interesting matter of minor importance.

Legal News and Notes.

—THE Tilton-Beecher suit promises a rich feast for the scandal-loving. One thousand jurors have been summoned.

—IT is said that large bodies move slowly; but Delaware, one of the smallest states of the Union, still retains the whipping-post.

—THOMAS DUNPHY, a prominent lawyer of New York city, formerly partner of Edwin James, died on the 7th inst.

—SIR JOHN BRUGES KARSLAKE, the eminent English lawyer and Queen's counsel, has become totally blind. His affliction was caused by overwork, and there is hope that it may prove temporary.

—MISSOURI is to have a constitutional convention, the late election having, according to the official count, resulted in a majority of 283 in favor of the measure.

—MR. ATTORNEY-GENERAL WILLIAMS has decided that the Hustings Court of Staunton, Va., is fully authorized, under the laws of Congress, to naturalize persons.

—MR. JUSTICE SWAYNE, of the Supreme Court of the United States, having reached his seventieth year, is entitled, under the law, to retire on full pay—a step which he contemplates taking, but has not yet fixed the day.

—JUDGE BALLARD, sitting in the United States District Court for the Western District of Tennessee, has sustained a motion to quash the indictments against the Gibson county kuklux, for want of jurisdiction, and the prisoners are discharged.

—"GATH" writes to the Chicago Tribune that General Sherman "had to keep nine servants in Washington, of whom he gets rid of one-half in Saint Louis." This reminds us of the Irish captain, who, when told on a march that there were five soldiers in one ambulance, shouted, "the half o' ye's get out!"

—WE are pleased to learn that Hon. John Lowell, United States District Judge for the District of Massachusetts, is preparing for publication a treatise on the bankrupt law. One of the best legacies a judge can leave behind him is to embody in a book the result of his experience on some topic that comes constantly before him in his judicial capacity.

—THE amendments to the New York constitution, voted on at the late election, were all adopted by very large majorities. That forbidding special legislation, had 414,345 votes in its favor, to 97,965 opposed. The largest vote was on an amendment, which provides additional security against bribery at elections, the whole number in its favor being 459,658, and against it 179,891.

—HON. EDWARD P. COWLES, formerly a justice of the Supreme Court o New York, died in Chicago on the first instant. He was admitted to the bar in 1839, was appointed to the bench in 1853, and was re-appointed at the close of his official term. Retiring at the close of his second term, he resumed the practice of the law, in which he was very successful. He died from a hurt while returning from a visit to California.

—JUDGE JAMESON, author of the work on constitutional conventions, has written a letter to the Chicago Tribune, in which he says distinctly, "I think it established, in the public law of the United States, that it is always in the power of a legislature to call a convention whenever it may deem it necessary or expedient to do so with a view either to amend or remodel the constitution." The only exception he allows is an express prohibition, by the constitution itself, of the exercise of such a power.

—JUDGE DURELL'S resignation will make five United States district judges who have left the bench within the past eighteen months, the other four being Sherman of Ohio, Delahay of Kansas, Story of Arkansas, and Busteed of Alabama. We wonder that they do not all resign. We do not see what there is to stay for. Certainly it is not the salary, and as to the honor, there certainly is not much honor in being judge of a *nisi prius* court of limited jurisdiction, if it is for life. And then to be tied up for life to an office from which you cannot get away long enough to go a-fishing. It is too much greatness.

—SIR JOSHUA ROWE, K. C. B., for many years Chief Justice of Jamaica, died in London last month. He was appointed chief justice in 1832. He was then a young man. At his decease he was nearly eighty years of age. He was remarkable for his upright conduct as a judge and the general correctness of his decisions. A few years ago he retired on a pension, when he was succeeded by the Hon. Bryan Edwards, who received the honor of knighthood on the occasion.